UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC, and MARTIN AFFILIATED, LLC,

Plaintiffs,

vs.

APPLE COMPUTER, INC. and AFTERMATH RECORDS d/b/a AFTERMATH ENTERTAINMENT

Defendant.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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[CORRECTED] PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE LATE PRODUCED DOCUMENTS

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Defendants' opposition (Doc. No. 86) contains misstatements of fact and law and attempts to distract the Court from the simple facts: (1) plaintiffs specifically asked defendants to produce documents related to their affirmative defenses and documents they contended authorized the exploitations involved herein (*see, e.g.*, Doc. No. 80 Ex. 1A, Requests 1, 2, 11); and (2) defendants did not produce any of the purported licenses or agreements during the discovery period in response to these requests, and failed to serve Rule 26(a) initial disclosures. Instead, more than a month after discovery closed, they produced some 999 pages of documents and immediately moved for summary judgment based on those documents. The response of the defendants offers no excuse for this behavior, and these documents should be excluded.

I. Defendants' Failure to Produce the Documents was Not Substantially Justified

Defendants contend their failure to timely produce or identify the documents in question should be excused for several reasons. First, defendants claim plaintiffs did not request these documents during the discovery period. (Doc. No. 86 at 6-9.) This is absurd. As discussed in plaintiffs' motion, plaintiffs' document requests asked for, among other things, documents concerning any of the affirmative defenses of the defendants (*see* Doc. No. 80, Ex. 1C, Request Nos. 1-2); and all documents that defendants believed provided a license to exploit the plaintiffs' compositions. (*Id.*, Request No. 11.) These requests required the production of the documents defendants did not produce until after the close of discovery.

Second, defendants contend there was never a Rule 26(f) conference between counsel, and their initial disclosures were therefore not required under the Rules. (*See* Doc. No. 86 at 4, Klaus Decl. ¶ 4.) To the contrary, Rule 26(a)(1)(A) requires parties to provide initial disclosures "without awaiting a discovery request," unless "otherwise stipulated or ordered by the court."

The defendants have not argued that either of these situations applies here. Further, although Rule 26(a)(1)(C) sets the time for serving initial disclosures as 14 days after a Rule 26(f) conference, it does not excuse disclosures in the absence of a 26(f) conference, and plaintiffs deny that a Rule 26(f) conference between the parties never occurred.[1]

Defendants state that "plaintiffs never demanded that defendants" provide initial disclosures. (Doc. No. 86 at 4.) This point, even if true, is irrelevant, since the Rules require initial disclosures "*without awaiting a discovery request*," and plaintiffs did demand that defendants comply with this requirement.[2] In May, as discovery in this case was ongoing, defendants for the first time disclosed the identity of one individual, Mr. Michael Ostroff, they might call at trial. (Busch Decl. ¶ 4, Ex. A.) When plaintiffs pointed out that defendants never provided Rule 26 initial disclosures, and requested Rule 26 disclosures, defendants claimed they did not have to provide them. (*Id.* ¶¶ 5-6, Exs. B, C; Hertz Decl. ¶ 2.)

Defendants also argue that plaintiffs "obviously are aware of relevant witnesses" because of the depositions already taken. (Doc. No. 86 at 4.) In fact, Plaintiffs never knew about these purported licenses or agreements, and therefore never questioned the multiple third parties or the witnesses they did depose about these transactions.

Finally, defendants contend that plaintiffs have received "ample document discovery" consisting of "more than 57,000 pages of documents [produced] to plaintiffs," (Doc. No. 86 at 4-5) as though this excuses their failure (until after discovery closed) to produce documents upon

[1] Plaintiffs do not agree that a Rule 26(f) conference never took place. At the outset of this case, counsel for plaintiffs and defendants specifically discussed the discovery required, agreed that documents produced in this action could be used in another action between the parties (*see* Doc. No. 35 ¶ 4), and agreed that depositions could be combined between the two cases so that only a single deposition of a fact witness knowledgeable about both cases would be necessary. (Busch Decl. ¶ 3.)

[2] Defendants acknowledge that plaintiffs served Rule 26 disclosures upon the defendants. *See* Doc. No. 86, Ex. A-3; Fed. R. Civ. Proc. 26(a)(1)(A).

which they filed a summary judgment motion. Defendants cannot defend their non-production of documents which they contend are dispositive by pointing to the volume of other documents produced. The simple truth is that plaintiffs were unaware of the existence or content of the vast majority of the late-produced documents defendants' summary judgment motion rests upon.

II. Plaintiffs Have Been Harmed by the Late Disclosure

Plaintiffs purported knowledge of the identities of the co-authors, their status as artists, "and that they have their own artists agreements" (*see* Doc. No. 86 at 16) is both misleading and irrelevant. The fact that co-authors may have had recording agreements with some entity does not give plaintiffs constructive knowledge of the content of those agreements. In fact, defendants keep the content of these agreements a closely guarded secret, as evidenced by the fact that they have marked them at the highest level of confidentiality, meaning that not even the principals of plaintiffs may view them. (*See, e.g.*, Doc. Nos. 55-61, 68-72.[3]) Prior to their late production, plaintiffs had no knowledge as to the content of any of the co-author agreements.

A party is required, in discovery requests, only to describe categories of documents with "reasonable particularity." Fed. R. Civ. Proc. 34(b)(1)(A). Several of plaintiffs' document requests clearly called for these documents. (*See* Doc. No. 66 at 5-6.) Defendants should not be rewarded for failing to produce these documents during discovery, advising plaintiffs' counsel that defendants did not believe it had any such licenses from third parties (*see* Doc. No. 80, Ex. 1 ¶ 13), and then dropping 1,000 pages of such documents on plaintiffs after the close of discovery and relying on such documents for summary judgment.[4]

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[3] Evidently, not even this level of confidentiality meets defendants' requirements, as they have redacted certain information from these agreements. (*See, e.g.*, Doc. Nos. 55-61.)

[4] Indeed, based upon conversations with opposing counsel, defendants led plaintiffs to believe that there were no documents responsive to their requests, or, at most, a very small number of documents. (*See* Doc. No. 80, Ex. 1 ¶

Defendants make much of the fact that plaintiffs never demanded depositions concerning these documents following the close of discovery, but ignore the relevant circumstances and facts. The production, which includes agreements and purported licenses between defendants and a number of third party entities, occurred from July 8 through July 26, 2008 (*see* Doc. No. 80 at 8), and defendants moved for summary judgment based on these documents immediately, on July 16, 2008. (*See* Doc. No. 53.) Defendants had previously objected to any additional depositions beyond those discussed on the record during a deposition in late May. When plaintiffs attempted to add two short depositions to this list (Busch Decl. ¶ 7), defendants protested and persuaded the court to allow only one to proceed. (*See* Doc. No. 50 ¶¶ 8-9.) These documents, produced after the close of discovery, would necessitate not only the taking of numerous depositions of third parties, but document requests and depositions of multiple related to defendants. (Busch Decl. ¶ 8.) The law is clear: it is not the plaintiffs' burden to move the Court to extend discovery, or take depositions outside of the discovery schedule. Instead, a party producing documents like these after discovery may not rely upon them, and such documents are to be excluded. Fed. R. Civ. Proc. 37(c)(1); *Dickenson v. Cardiax and Thoracic Surgery of Eastern Tenn.*, 388 F.3d 976, 983 (6th Cir. 2004)).[5]

III. No "Lesser Sanction" is Appropriate or Available

Finally, defendants ask the court to apply a lesser sanction: "allow plaintiffs to depose *a* witness whose testimony *may be relevant* concerning the Co-Author Agreements." (Doc. No. 86 at 19 (emphasis added).) This remedy would be wholly insufficient, is inappropriate under the

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13.) It is patently unfair to then produce 1,000 pages of documents following the close of discovery, and claim that they were merely complying with the Court's Order.

[5] In addition, as explained in plaintiffs' opposition to defendants' summary judgment motion, the purported licenses in these documents are invalid for a variety of reasons. (*See* Doc. No. 74 at 23-26.)

Rules, and ignores the investigation and multiple third party depositions required in order to rebut these documents. The only legal support defendants have cited for their contention that the court should simply order a deposition is *Roberts v. Galen of Virginia*. (Doc. No. 86 at 18 (citing 325 F.3d 776, 784 (6th Cir. 2003).) There, the defendant substituted a new expert to testify in place of the originally designated expert, who was unavailable at the time of trial. *Id.* at 782. The "sensible" and "equitable" solution adopted by the district court, and approved by the Sixth Circuit, was to limit the new expert to testifying only to matters within the original expert's written report. *Id.* at 784. This order operated to exclude *any new undisclosed testimony* the replacement-expert might offer and was thus identical in effect to the sanction plaintiffs have requested: exclusion of undisclosed evidence.

The Sixth Circuit has interpreted Rule 37(c) as *requiring* exclusion of non-disclosed evidence absent justification or harmlessness. (*See* Doc. No. 80 at 9 (citing *Dickenson v. Cardiax and Thoracic Surgery of Eastern Tenn.*, 388 F.3d 976, 983 (6th Cir. 2004)).) Under this binding precedent, the Court must exclude the late-produced evidence unless it finds defendants' failure to disclose harmless or substantially justified, which it was not.

* * * *

For the reasons set forth above, and in their Motion (Doc. No. 80), Plaintiffs respectfully request that their motion be granted.

Respectfully submitted,

/s/ Richard S. Busch	/s/ Howard Hertz
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Attorneys for plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2008, I electronically filed the Plaintiffs' Motion and supporting Memorandum to Exclude Late Produced Documents and the Declaration of Richard S. Busch with the Clerk of the Court using the ECF system which will send notification of such filing to the ECF Participants.

____/s/ Richard S. Busch________________

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